IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.6426 OF 2005

Narendra D. Ghelani).. Petitioner

Versus

Pravin Nanalal Shah and others).. Respondents

Mr.R.A. Thorat for the Petitioner.

Mr.R.S. Mirza for the Respondents.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 26TH OCTOBER 2005

P.C.:

. The order which has been challenged in this Petition is dated 20th September 2005 passed by the Small Causes Court in Appeal No.214 of 1995. By this order, the Appeal Court has directed that the application dated 9th September 2005 filed by the Petitioner under Order 41 Rule 27 of the Civil Procedure Code would be decided at the time when the Appeal was heard.

2. The Suit was dismissed on 18th November 2000. The Respondents preferred an Appeal on 8th January 2002. Two years thereafter on 2nd June 2004, Respondent No.1 filed an affidavit regarding the changed circumstances subsequent to the filing of the Appeal. In this affidavit, Respondent No.1 has stated that the premises

at Ratnam Apartments had been sold. Respondent No.2's wife had purchased a flat out of the sale proceeds at Sion and Respondent No.3 had temporarily shifted to a residential accommodation on leave and licence. According to Respondent No.1, the need of the Respondents had increased after the dismissal of the Suit. The Petitioner filed his reply on 15th February 2005 averring that the premises in Ratnam Apartments belonged to the joint family and the need of the Respondents had been met in view of the sale of the Ratnam Apartments premises. After this affidavit, several affidavits were filed by both parties. The Petitioner then on 9th September 2005 filed an application under Order 41 Rule 27 of the Civil Procedure Code contending that the issue regarding the changed circumstances should be decided by evidence being led before the trial Court.

3. In my view, the Appeal Court could not have observed that the application would be decided along with the Appeal. The Appeal Court should have either rejected or allowed the application. The procedure adopted by the Appeal Court is erroneous. Therefore, in my view, the Appeal Court must decide the application filed under Order 41 Rule 27 in the light of the judgment of the Supreme Court in the case of *Adil Jamshed Frenchman* vs. *Sardar Dastur School Trust and others*, **2005 (2) Mh.L.J. 5**, prior to the Appeal being heard.

4. Both parties should appear before the Appeal Court on 11th November 2005 on which date the Appeal Court will decide whether the application made under Order 41 Rule 27 of the Civil Procedure Code should be allowed or rejected.

5. Writ Petition disposed of accordingly.